

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BLUETOOTH SIG, INC., a Delaware
corporation,

Plaintiff,

v.

FCA US LLC, a Delaware limited liability
company,

Defendant.

Case No. 2:18-cv-01493-RAJ

ORDER

I. INTRODUCTION

Before the Court are three motions. Having considered the submissions of the parties, the relevant portions of the record, and the applicable law, the Court finds that oral argument is unnecessary. For the reasons below, Plaintiff's Motion to Exclude the Expert Report and Testimony of David T. Neal (Dkt. # 57) is **DENIED**; Defendant's Motion to Exclude Christopher Gerardi's Testimony and Opinions (Dkt. # 151) is **GRANTED in part** and **DENIED in part**; and Defendant's Motion to Exclude Michal Malkiewicz (Dkt. # 152) is **DENIED**.

Two preliminary matters: First, in ruling on the parties' cross motions for summary judgment, the Court summarized the facts of this case. Dkt. # 202. To avoid duplication, the Court refers the parties to that order for background information.

Second, Defendant's counsel should rethink their use of footnotes. The Court strongly

1 disfavors footnoted legal citations, which serve as an end-run around page limits and
 2 formatting requirements dictated by the Local Rules. *See* Local Rules W.D. Wash. LCR
 3 7(e). Moreover, several courts have observed that “citations are highly relevant in a legal
 4 brief” and including them in footnotes “makes brief-reading difficult.” *Wichansky v.*
 5 *Zowine*, No. CV-13-01208-PHX-DGC, 2014 WL 289924, at *1 n.1 (D. Ariz. Jan. 24,
 6 2014). The Court strongly discourages the parties from footnoting their legal citations in
 7 any future submissions. *See Kano v. Nat’l Consumer Co-op Bank*, 22 F.3d 899-900 (9th
 8 Cir. 1994).

9 **II. LEGAL STANDARD**

10 The admissibility of expert opinions is guided by Federal Rule of Evidence 702,
 11 which in part states that an expert by “knowledge, skill, experience, training or education
 12 may testify in the form of an opinion or otherwise if . . . the expert’s scientific, technical
 13 or other specialized knowledge will help the trier of fact to understand the evidence or to
 14 determine a fact in issue.” Fed. R. Evid. 702. A trial court must ensure that an expert’s
 15 testimony “both rests on a reliable foundation and is relevant to the task at hand.”
 16 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The testimony is
 17 reliable “if the knowledge underlying it has a reliable basis in the knowledge and
 18 experience of the relevant discipline,” and it is relevant “if the knowledge underlying it
 19 has a valid connection to the pertinent inquiry.” *Primiano v. Cook*, 598 F.3d 558, 565
 20 (9th Cir. 2010) (quoting *United States v. Sandoval–Mendoza*, 472 F.3d 645, 654 (9th Cir.
 21 2006)). “Shaky but admissible evidence” is to be attacked by “[v]igorous cross-
 22 examination, presentation of contrary evidence, and careful instruction on the burden of
 23 proof,” not exclusion. *Daubert*, 509 U.S. at 596.

24 **III. DISCUSSION**

25 Plaintiff Bluetooth SIG, Inc. (“Bluetooth”) moves to exclude the report and
 26 testimony of David T. Neal, an expert offered by Defendant FCA US LLC (“FCA”).
 27 Dkt. # 57. Based on a survey that he conducted, Mr. Neal concludes that FCA’s use of

1 the word “Bluetooth” does not make consumers more likely to buy an FCA vehicle. *Id.*
 2 at 6. On the other hand, FCA moves to exclude the testimony of Bluetooth’s experts,
 3 Christopher P. Gerardi and Michal A. Malkiewicz. Dkt. ## 151, 152. Mr. Gerardi opines
 4 on the amount that FCA may owe if Bluetooth succeeds, and Mr. Malkiewicz, a rebuttal
 5 expert, cites several deficiencies in Mr. Neal’s survey. The Court analyzes each motion
 6 in turn.

7 **A. David T. Neal**

8 To “isolate the value that likely purchasers of FCA vehicles place” on the
 9 BLUETOOTH word mark, Mr. Neal designed and executed a national survey. Dkt.
 10 # 158-7 at 218. The purpose of the survey was to measure the value that consumers place
 11 on the BLUETOOTH word mark against the value that they place on the underlying
 12 “functionality enabled by the technology.” *Id.* at 220.

13 To that end, Mr. Neal surveyed how different consumers responded to different
 14 Monroney labels. *Id.* at 219. Monroney labels, or “window stickers,” list specifications
 15 about a given vehicle and must be displayed on a new vehicle displayed for sale. *Id.* at
 16 219. About half the survey respondents were randomly assigned and shown the standard
 17 Monroney label for the Jeep Grand Cherokee Limited (“Grand Cherokee”). *Id.* The
 18 standard Monroney label served as the “Test Condition” and listed as a feature
 19 “Integrated Voice Command *with Bluetooth*.” *Id.* (emphasis added). The remaining
 20 respondents were shown the “Control Condition,” which was the same Monroney label
 21 but with alternate wording, “Integrated Voice Command *with Wireless Smartphone*
 22 *Connectivity*.” *Id.* (emphasis added). The survey then asked all respondents whether
 23 they would be willing to buy the Grand Cherokee at various prices, beginning with the
 24 manufacturer’s suggested retail price and offering several discounts from there. *Id.* at
 25 221. Analyzing the results of the survey, Mr. Neal concludes that “use of the term
 26 ‘Bluetooth’ in describing the wireless smartphone capability of an FCA vehicle does not
 27 cause any consumers to be more likely to buy an FCA vehicle at full price . . . [or at] a

1 discount.” *Id.* at 224.

2 Bluetooth argues that this survey, its accompanying report, and Mr. Neal’s
3 testimony should be excluded. Dkt. # 57. Bluetooth says that the term “wireless
4 smartphone connectivity” is “completely ambiguous,” that the Grand Cherokee is not a
5 representative sample of all FCA vehicles, and that the survey does not replicate
6 marketplace conditions. *Id.* at 8-15. These flaws, Bluetooth says, warrant exclusion
7 under Rules 702 and 403 of the Federal Rules of Evidence. *Id.* at 15.

8 The Ninth Circuit has long held that survey evidence should be admitted “as long
9 as [it is] conducted according to accepted principles and [is] relevant.” *Fortune*
10 *Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th
11 Cir. 2010) (alterations in original) (quoting *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 814
12 (9th Cir. 1997)). “Challenges to survey methodology go to the weight given [to] the
13 survey, not its admissibility.” *Wendt*, 125 F.3d at 814. This includes challenges to
14 “methodology, survey design, reliability, the experience and the reputation of the expert,
15 critique of conclusions, and the like.” *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d
16 1252, 1263 (9th Cir. 2001).

17 Because Mr. Neal’s survey is reliable and relevant, it will not be excluded. Mr.
18 Neal used a “direct survey,” which he contended is a “staple[] in the academic literature”
19 and “appear[s] routinely in the pages of top peer-reviewed scholarly journals.” Dkt.
20 # 158-7 at 219. Bluetooth does not contest that. Thus, the survey was reliable as it was
21 conducted using accepted principles. Further, the value of the BLUETOOTH word mark
22 (one of three marks at the center of this case) is pertinent to Bluetooth’s trademark
23 infringement claims and is therefore relevant. For those reasons, the survey should be
24 admitted above Bluetooth’s objections. At most, the survey’s alleged flaws of ambiguity,
25 unrepresentative sampling, and unrealistic marketplace assumptions are “technical
26 inadequacies” that “bear on the weight of the evidence, not its admissibility.” *Fortune*,
27 618 F.3d at 1036 (quoting *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988)).

Bluetooth suggests, however, that Mr. Neal’s use of “completely ambiguous language” is not a technical flaw but a fatal one. Dkt. # 57 at 8. In short, because Mr. Neal did not ask respondents if they knew what “wireless smartphone connectivity” meant, they could have believed that the term in fact included Bluetooth technology. *Id.* at 9. For example, a respondent presented with the Control Condition (the Monroney label saying “Integrated Voice Command with Wireless Smartphone Connectivity”) could have believed that the Grand Cherokee being offered was in fact equipped with Bluetooth technology. If that were the case, Bluetooth surmises, the survey would have simply “compar[ed] BLUETOOTH to BLUETOOTH and [the] survey results [would be] completely meaningless.” *Id.*

But Bluetooth confuses the value of the BLUETOOTH word mark with the value of the underlying technology itself. Dkt. # 93 at 11. Mr. Neal’s survey tested whether consumers placed a premium on “Bluetooth” the word—not Bluetooth the technology. Put differently, Mr. Neal was not measuring whether Bluetooth technology made a consumer more willing to buy an FCA vehicle: he was measuring whether the word “Bluetooth” made a consumer more willing to buy an FCA vehicle. Mr. Neal’s survey appears to do just that by comparing the word “Bluetooth” against the phrase “wireless smartphone connectivity.” Thus, Bluetooth’s claimed ambiguity would have been harmless (or at the very least, non-fatal) to the results of the survey.

For these reasons, Bluetooth’s motion to exclude Mr. Neal’s report and testimony is **DENIED**.

B. Christopher P. Gerardi

Mr. Gerardi, Bluetooth’s damages expert, rendered an initial and supplemental report opining on the amounts that Bluetooth may be entitled to in the way of (1) actual damages and (2) disgorgement of profits. Dkt. # 158-7 at 86-92, 328-33. In calculating these amounts, Mr. Gerardi relied on representations that he received from the parties and explained the assumptions that his calculations were based on. *See, e.g., id.* at 329-32.

1 His testimony is both reliable and relevant. It is reliable because Mr. Gerardi applied
2 basic accounting principles—indeed, as FCA puts it, “simple arithmetic” or “elementary
3 mathematical calculations.” Dkt. # 151 at 10-11. The Court has no reason to believe
4 that, given Mr. Gerardi’s stated assumptions, his calculations are incorrect. And his
5 testimony is no doubt relevant as his calculations bear on Bluetooth’s requested relief.

6 Though reliable and relevant, Mr. Gerardi’s actual damages calculations are based
7 on information that Bluetooth received during settlement negotiations. To calculate
8 actual damages, Mr. Gerardi was “advised by counsel” to assume that FCA, had it been a
9 Bluetooth member, would have had to file a specific number of declarations for its
10 Bluetooth-enabled vehicles. Dkt. # 158-7 at 329-30. Bluetooth’s counsel, however,
11 received that specified number as an estimate from FCA during settlement negotiations.
12 Dkt. # 171 at 6; *see also* Dkt. # 174-2. This information falls squarely under Rule 408 of
13 the Federal Rules of Evidence, which deems inadmissible a “statement made during
14 compromise negotiations” to “prove or disprove the validity or amount of a disputed
15 claim.” Fed. R. Evid. 408. Thus, to the extent that it relies on information received as
16 part of settlement negotiations, Mr. Gerardi’s testimony on actual damages must be
17 excluded.

18 As for disgorgement of profits, FCA argues that the Court should limit Mr.
19 Gerardi’s testimony. Dkt. # 151 at 12-13. According to FCA, Mr. Gerardi assumed that
20 there was “no temporal limitation to the profits that may be disgorged,” and he
21 accordingly used 2004 as a starting point for his calculations. *Id.* But laches, FCA says,
22 limits Bluetooth’s recovery to the applicable statute of limitations period, and thus Mr.
23 Gerardi’s calculations should have begun in 2015. *Id.* The Court will not limit Mr.
24 Gerardi’s testimony. As the Court explained in its summary judgment order, laches may
25 bar all monetary recovery. Dkt. # 202 at 27 (“The affirmative defense of laches ‘is an
26 equitable time limitation on a party’s right to bring suit’”) (quoting *Eat Right Foods*
27 *Ltd. v. Whole Foods Mkt., Inc.*, 880 F.3d 1109, 1115 (9th Cir. 2018)) (emphasis added).

1 If FCA indeed prevails on its laches defense, then there would be no need for a “temporal
2 limitation” on Mr. Gerardi’s calculations because there would be no disgorgement of
3 profits in the first place. In any event, FCA is free to address any shortcomings in Mr.
4 Gerardi’s calculations on cross-examination.

5 For these reasons, Bluetooth’s motion to exclude and limit Mr. Gerardi’s
6 testimony is **GRANTED in part** and **DENIED in part**. Mr. Gerardi’s testimony is
7 excluded to the extent that it relies on information protected by Rule 408 of the Federal
8 Rules of Evidence.

9 **C. Michal A. Malkiewicz**

10 To rebut Mr. Neal’s survey testimony, Bluetooth engaged an expert of its own,
11 Michael A. Malkiewicz. Dkt. # 159 at 4. Mr. Malkiewicz argued that Mr. Neal’s survey
12 was flawed and unreliable for many reasons: it did not consider that two of the three
13 marks were certification marks, it suffered from “critical sampling issues,” and it failed to
14 “replicate the marketplace environment of the vehicle purchasing process,” to name a
15 few. Dkt. # 158-7 at 365. In all, Mr. Malkiewicz concludes that Mr. Neal’s analysis is
16 “of no use to the question of value of the [BLUETOOTH Marks] . . . [and] of no use in
17 separating out a portion of FCA’s sales or profits, if any, that is unrelated to FCA’s
18 alleged uses of the [BLUETOOTH Marks].” *Id.* at 366.

19 To start, Mr. Malkiewicz’s testimony appears reliable and relevant. Mr.
20 Malkiewicz has experience in and knowledge of survey research methods and marketing
21 analytics. And he uses that experience and knowledge to undermine Mr. Neal’s
22 conclusions about the value of the BLUETOOTH Marks, a central issue in this case.
23 Despite that, FCA asks the Court to exclude Mr. Malkiewicz for three reasons: he is
24 unqualified, his opinions are unreliable, and his opinions would mislead a trier of fact.

25 First, according to FCA, Mr. Malkiewicz is not an expert “in the area of trademark
26 litigation surveys” but rather is an economist specializing in damages assessments. Dkt.
27 # 152 at 9. As such, FCA says, he is ill-equipped to critique Mr. Neal’s trademark

1 survey. *Id.* But an economist may also be trained in survey research methods, as Mr.
2 Malkiewicz is. He was a survey research professional at the National Opinion Research
3 Center and has a certificate in marketing analytics from the University of Chicago. Dkt.
4 # 158-7 at 405, 409. He has also studied graduate-level statistics and survey research
5 methods at Johns Hopkins University. Dkt. # 150 at 5. This is enough to lay at least the
6 “minimal foundation of knowledge, skill, and experience required in order to give
7 ‘expert’ testimony” as to survey design and methodology. *Thomas v. Newton Int’l*
8 *Enterprises*, 42 F.3d 1266, 1269-70 (9th Cir. 1994) (holding that Federal Rule of
9 Evidence 702 “contemplates a broad conception of expert qualifications” and is “broadly
10 phrased and intended to embrace more than a narrow definition of a qualified expert”).

11 Next, FCA argues that Mr. Malkiewicz’s report and testimony do not rest on a
12 reliable foundation: He did not conduct a survey of his own to show that his criticisms
13 would have changed Mr. Neal’s results. Dkt. # 152 at 12. He did not fully read some of
14 the materials that he relied on. *Id.* at 13. And other materials, he conceded, lacked basis
15 in any data or relied on data sourced from a survey conducted abroad. *Id.*

16 But these are deficiencies fit for cross-examination, not exclusion. Mr.
17 Malkiewicz had no obligation to conduct a survey of his own. And the “factual basis of
18 an expert opinion goes to the credibility of the testimony, not the admissibility, and it is
19 up to the opposing party to examine the factual basis for the opinion in cross-
20 examination.” *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales*
21 *Practices, & Prod. Liab. Litig.*, 978 F. Supp. 2d 1053, 1069 (C.D. Cal. 2013) (citing
22 *Hartley v. Dillard’s, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002)). FCA’s critiques of Mr.
23 Malkiewicz’s report may be persuasive and may even reduce the weight that a trier of
24 fact gives to it, but the Court holds that this is no reason for exclusion.

25 Finally, FCA argues that Mr. Malkiewicz’s report and testimony should be
26 excluded because they would confuse a trier of fact. Dkt. # 152 at 15. The Court
27 disagrees. FCA’s list of Mr. Malkiewicz’s deficiencies is copious, but it is not confusing.

1 For these reasons, Bluetooth's motion to exclude Mr. Malkiewicz is **DENIED**.

2 **IV. CONCLUSION**

3 For the reasons stated above, the Court **DENIES** Plaintiff's Motion to Exclude the
4 Expert Report and Testimony of David T. Neal (Dkt. # 57); **GRANTS in part** and
5 **DENIES in part** Defendant's Motion to Exclude Christopher Gerardi's Testimony and
6 Opinions (Dkt. # 151); and **DENIES** Defendant's Motion to exclude Michal Malkiewicz
7 (Dkt. # 152).

8 DATED this 24th day of June, 2020.

9
10 
11

12 The Honorable Richard A. Jones
13 United States District Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28